(2)

No. 96-792

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LYNNE KALINA,
Petitioner,
v.
RODNEY FLETCHER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF AMICI CURIAE THIRTY-NINE WASHINGTON STATE COUNTIES IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

14 pp

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Prosecuting Attorneys of the thirty-nine Washington State Counties* hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The

* David Sandhaus, Adams County, Prosecuting Attorney; Ray Lutes, Asotin County, Prosecuting Attorney; Andrew K. Miller, Benton County, Prosecuting Attorney; Gary Riesen, Chelan County, Prosecuting Attorney; David Bruneau, Clallam County, Prosecuting Attorney; Arthur Curtis, Clark County, Prosecuting Attorney; Terry Nealey, Columbia County, Prosecuting Attorney; James Stonier, Cowlitz County, Prosecuting Attorney; Steven M. Clem, Douglas County, Prosecuting Attorney; Allen C. Nielson, Ferry County, Prosecuting Attorney; Steve M. Lowe, Franklin County, Prosecuting Attorney; John Henry, Garfield County, Prosecuting Attorney; John Knodell, Grant County, Prosecuting Attorney; H. Steward Menefee, Grays Harbor County, Prosecuting Attorney; William H. Hawkins, Island County, Prosecuting Attorney; David Skeen, Jefferson County, Prosecuting Attorney; Norm Maleng, King County, Prosecuting Attorney; Russell D. Hauge, Kitsap County, Prosecuting Attorney; Greg Zempel, Kittitas County,

consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent has not been sought because Rule 37(4) applies.

The interest of the Prosecuting Attorneys in this case arises from the fact that the Ninth Circuit opinion will have a chilling effect on their ability to fearlessly prosecute criminals and will divert needed public funds from criminal prosecution to the defense of civil lawsuits.

Respectfully submitted,

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Prosecuting Attorney; Knute Rife, Klickitat County, Prosecuting Attorney; Jeremy Randolf, Lewis County, Prosecuting Attorney; Ronald Shepherd, Lincoln County, Prosecuting Attorney; Gary Burleson, Mason County, Prosecuting Attorney; Rick Weber, Okanogan County, Prosecuting Attorney; Michael Smith, Pacific County, Prosecuting Attorney; Thomas A. Metzger, Pend Oreille County, Prosecuting Attorney; John Ladenburg, Pierce County, Prosecuting Attorney; Randall K. Gaylord, San Juan County, Prosecuting Attorney; David Needy, Skagit County, Prosecuting Attorney; Bradley Anderson, Skamania County, Prosecuting Attorney; James Krider, Snohomish County, Prosecuting Attorney; James Sweetser, Spokane County, Prosecuting Attorney; John G. Wetle, Stevens County, Prosecuting Attorney; Bernardean Broadous, Thurston County, Prosecuting Attorney; Fred A. Johnson, Wahkiakum County, Prosecuting Attorney; James L. Nagle, Walla Walla County, Prosecuting Attorney; David S. McEachran, Whatcom County, Prosecuting Attorney; James Kaufman, Whitman County, Prosecuting Attorney; Jeffrey C. Sullivan, Yakima County, Prosecuting Attorney.

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BRIEF OF AMICI CURIAE THIRTY-NINE WASHINGTON STATE COUNTIES IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The State of Washington abandoned its mandatory grand jury practice some 80 years ago.[1] Since that time prosecutions have been instituted on information filed by the prosecutor, on many occasions without even a prior judicial determination of "probable cause". This procedure received this Court's approval in *Beck v. Washington*, 369 U.S. 541, 545 (1962).

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[1] Washington Laws 1909, c. 87.

Thousands of criminal cases each year are initiated by information in the State of Washington by Prosecuting Attorneys and their deputies.[2] The filing of the information, under Washington law, can trigger the start of Washington's court rule speedy trial period.[3] A failure to secure the presence of the defendant in court within 104 days of the filing of the information may result in the dismissal of charges with prejudice.[4] Both the Washington courts and the Washington legislature have placed the burden of securing the presence of the defendant in court upon the prosecutor.[5]

In order to timely secure the defendant's presence for trial, the prosecuting attorney will often request a warrant of arrest.[6] Consistent with this Court's opinion in *Gerstein v. Pugh*, 420 U.S. 103 (1975), such a request must be

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[2] Both juvenile offender cases and criminal cases filed in the Washington superior courts are initiated by information. Washington Criminal Rule 2.1; R.C.W. 13.40.070. In 1993, 29,765 criminal cases and 24,360 juvenile offender cases were filed in the superior courts of Washington. In 1994, 30,395 criminal cases and 25,883 juvenile offender cases were filed in the superior courts of Washington. In 1995, 33,965 criminal cases and 27,716 juvenile offender cases were filed in the superior courts of Washington. *See* Office of the Administrator for the Courts, *Caseloads of the Courts of Washington 1995*, at 38 (1996).

[3] *State v. Greenwood*, 845 P.2d 971 (Wash. 1993); *State v. Striker*, 557 P.2d 847 (Wash. 1976).

[4] *See generally*, *State v. Stewart*, 922 P.2d 1356, 1360 (Wash. 1996); *Greenwood*, 845 P.2d at 974; *Striker*, 557 P.2d at 852.

[5] R.C.W. 36.27.020(6); *State v. Anderson*, 855 P.2d 671 (Wash. 1993); *State v. Greenwood*, *supra*.

[6] Prosecutors' attempts to satisfy the Washington speedy trial court rule by mailing letters to the defendants that advise them of the pending charges have had mixed success in the Washington courts. *See, e.g., State v. Marler*, 911 P.2d 420 (Wash. App.), *review denied*, 919 P.2d 601 (Wash. 1996); *State v. Bazan*, 904 P.2d 1167 (Wash. App. 1995), *review denied*, 919 P.2d 600 (Wash. 1996).

accompanied by a certificate or statement of probable cause to support the charge. Under Washington law,[7] the certificate of probable cause can consist solely of a summary of the contents of the police reports.[8]

The certificate of probable cause is utilized by the court and the prosecution for purposes other than obtaining a warrant of arrest. The facts contained in the certificate of probable cause are considered in determining the amount of bail or other conditions of pretrial release.[9] Facts contained in the certificate of probable cause are considered in determining whether a defendant had notice of all of the elements of an offense.[10]

The information contained in the certificate of probable cause can form the factual basis for a guilty plea.[11] The facts contained in the certificate of probable cause may be considered in deciding whether a defendant is entitled to a judgment of acquittal by reason of insanity.[12]

The facts in the certificate of probable cause are relied upon to establish whether a spouse is competent to testify

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[7] Other Ninth Circuit states also allow their certificates of probable cause to be based solely upon the hearsay contents of police reports. *See, e.g.*, Idaho Criminal Rule 4.

[8] Washington Criminal Rule 2.2(a); Washington Juvenile Court Rule 7.5(b).

[9] Washington Criminal Rule 3.2(a).

[10] *State v. Kjorsvik*, 812 P.2d 86 (Wash. 1991); *State v. Garcia*, 829 P.2d 241 (Wash. App.), *review denied*, 838 P.2d 1143 (Wash. 1992); *State v. Bryant*, 828 P.2d 1121 (Wash. App.), *review denied*, 833 P.2d 1389 (Wash. 1992).

[11] *See, e.g., State v. Saas*, 820 P.2d 505 (Wash. 1991); *State v. Arnold*, 914 P.2d 762, 765 (Wash. App.) ("The judge stated positively that he always reads and considers those certificates, and that he did so this time [when accepting a guilty plea]"), *review denied*, 925 P.2d 989 (Wash. 1996).

[12] *State v. Autrey*, 794 P.2d 81 (Wash. App.), *review denied*, 802 P.2d 127 (Wash. 1990).

against a defendant without the defendant's permission.[13] Information in a certificate of probable cause can establish whether a prior conviction is admissible for impeachment purposes under Washington Evidence Rule 609.[14] The material in a certificate of probable cause can be utilized by the court in determining a proper sentence.[15]

Material contained in a certificate of probable cause can provide the background facts for Washington's appellate courts.[16] Information in a certificate of probable cause has been utilized by the Washington Supreme Court to determine which portion of an obscenity statute applied to a particular case.[17]

The Ninth Circuit's opinion in *Fletcher v. Kalina*, 93 F.3d 653 (9th Cir. 1996), has stripped prosecutors of their absolute immunity for engaging in routine procedures under Washington law for initiating and pursuing criminal prosecutions. The Ninth Circuit's opinion, if left intact, will severly impact prosecutors' ability to vigorously and fearlessly perform their duty. The Ninth Circuit's ruling diverts scarce prosecutorial resources from the enforcement of criminal laws to the defense of civil lawsuits.

ARGUMENT

Public prosecutors must administer their offices with courage and independence. Both of these qualities are impeded when the prosecutor is made subject to suit by those whom she accuses and fails to convict. *Imbler v.*

[13] *State v. Thornton*, 835 P.2d 216 (Wash. 1992).

[14] *See, e.g., State v. Schroeder*, 834 P.2d 105 (Wash. App. 1992).

[15] *State v. Overvold*, 825 P.2d 729 (Wash. App. 1992); *State v. Cooper*, 816 P.2d 784 (Wash. App. 1991); *State v. Tindal*, 748 P.2d 695 (Wash. App. 1988).

[16] *See, e.g., State v. Herzog*, 771 P.2d 739 (Wash. 1989); *State v. Becker*, 801 P.2d 1015 (Wash. App. 1990).

[17] *State v. Reece*, 757 P.2d 947 (Wash. 1988), *cert. denied*, 493 U.S. 812 (1989).

Pachtman, 424 U.S. 409, 423-24 (1976), quoting *Pearson v. Reed*, 44 P.2d 592, 597 (Cal. App. 1935). Accordingly, this Court has provided prosecutors with absolute immunity under § 1983 law suits for actions intimately associated with the judicial phase of the criminal process. *Imbler*, 424 U.S. at 430.

The Ninth Circuit ignores the teachings of *Imbler* in its decision in *Fletcher v. Kalina, supra.* The Ninth Circuit, focusing on the issuance of the arrest warrant, instead of the purpose for the warrant and the warrant's relationship to the charging function, determined that prosecutors are only entitled to qualified immunity for any errors contained in the certificate of probable cause.[18] Other Circuits, which have focused on the purpose of a post-charging arrest warrant, have had little difficulty in finding that absolute immunity should be extended to prosecutors who request the arrest warrants.[19]

The Ninth Circuit decision in *Fletcher v. Kalina*, assumes the sole purpose of the certificate of probable cause is to secure a warrant of arrest. Such is not the case. In Washington, the certificate of probable cause is intimately associated with the judicial process in other ways, as well.

Generally, the certificate of probable cause is the only document in the court file that outlines in detail the facts in every criminal prosecution. The certificate of probable cause is intimately associated with the entire judicial process, beginning with the filing of an information, through sentencing and appeal. As such, prosecutors must

[18] *Fletcher v. Kalina*, 93 F.3d at 655.

[19] *See Lerwill v. Joslin*, 712 F.2d 435 (10th Cir. 1983); *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987); *cf. Schrob v. Catterson*, 948 F.2d 1402 (3rd Cir. 1991) (prosecuting attorney entitled to absolute immunity for a seizure warrant in a civil case); *Erlich v. Giuliani*, 910 F.2d 1220 (4th Cir. 1990) (prosecuting attorney entitled to absolute immunity for a seizure warrant in a civil case).

enjoy absolute immunity for drafting, signing, and filing the certificates. By likening a warrant secured by a police officer to a prosecutor's certificate of probable cause, the Ninth Circuit erred.

While absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity, the fate of prosecutors with qualified immunity depends upon the circumstances and motivations of the prosecutors' actions, as established by the evidence at trial.[20] A prosecutor who merely enjoys qualified immunity must answer in court each time a person charges him or her with wrongdoing. This diverts the prosecutor's energy and attention from the pressing duty of enforcing the criminal laws.[21] Moreover, as this Court noted in *Imbler*, suits that survive the pleadings would pose substantial danger of liability even to the honest prosecutor:

> It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or adminisrtative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.[22]

The Ninth Circuit's opinion has created great uncertainty about how prosecutors can balance their potential civil liability with strict and fair law enforcement. Washington prosecutors generally lack the resources for conducting their own investigations. They determine whether

[20] *See Imbler*, 424 U.S. at 419 n. 13, citing *Scheuer v. Rhodes*, 416 U.S. 232, 238-39 (1974); *Wood v. Strickland*, 420 U.S. 308, 320-22 (1975).

[21] *Imbler*, 424 U.S. at 424.

[22] *Imbler*, 424 U.S. at 425-26.

to file charges on the basis of investigations conducted by law enforcement agencies. The opinion casts the legitimacy of this procedure into doubt. It suggests that prosecutors will be liable if they should have known that the facts reported by police are false. This requires them to conduct investigations of some indeterminate scope.

Following the Ninth Circuit opinion in *Fletcher v. Kalina*, prosecutors now wonder if a decision to rely upon police officers' reports in preparation of certificates of probable cause instead of personally re-interviewing witnesses will engender liability for failure to investigate. Prosecutors now wonder if a decision to rely upon affidavits that summarize the evidence in support of a request for a post-charging warrant of arrest instead of requiring the complainant and other witnesses to appear personally before the judge for questioning will engender liability for omitting a fact that might later prove exculpatory. Finally, prosecutors now wonder whether resurrection of the grand jury system is the only way to avoid suits for damages from a defendant who resents being arrested to answer a charged crime.[23] Unfortunately, all of these procedures to limit potential liability are time-consuming and will result in a marked decline in criminal prosecution and the very real possibility that felons will go unpunished.

[23] The Federal Courts appear to agree that prosecutors are immune from § 1983 liability for their conduct before a grand jury. *See, e.g., Hill v. City of New York*, 45 F.3d 653, 661 (2nd Cir. 1995); *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), *cert. denied*, —— U.S. ——, 115 S. Ct. 740 (1995).

CONCLUSION

This Court should grant Lynne Kalina's Petition for Writ of Certiorari and reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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